

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 15, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2422

Cir. Ct. No. 2014CV106

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

BARBARA NAHMENS,

PLAINTIFF-APPELLANT,

V.

JOHN ZIMMERMANN A/K/A JACK ZIMMERMAN,

DEFENDANT-RESPONDENT,

**AMERICAN INSURANCE ORGANIZATION
A/K/A ABC INSURANCE COMPANY,**

DEFENDANT.

APPEAL from an order of the circuit court for Jefferson County:
JENNIFER L. WESTON, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten, and Blanchard, JJ.

¶1 PER CURIAM. Barbara Nahmens appeals a circuit court order that dismissed Nahmens's professional negligence action against John Zimmermann on summary judgment. The circuit court granted summary judgment on the ground that Nahmens failed to name an expert witness to establish the professional standard of care in this case. Nahmens contends that this was error. We conclude that expert testimony was required to establish the professional standard of care to support Nahmens's negligence action. Because Nahmens failed to name an expert witness at the summary judgment stage, the circuit court properly granted summary judgment to Zimmermann. Accordingly, we affirm.

¶2 Nahmens sued Zimmermann for professional negligence related to Zimmermann's services as Nahmens's agent for procuring health insurance. According to the complaint, Nahmens followed Zimmermann's advice and obtained a health insurance policy from the Association for Independent Managers (AIM). Nahmens alleges that Zimmermann did not verify that AIM was a properly licensed health insurance provider before recommending the AIM policy to Nahmens.

¶3 Nahmens further alleged that she underwent hip replacement surgery and submitted her AIM health insurance policy information to the hospital. However, AIM did not pay any of Nahmens's medical bills from the surgery. Nahmens then discovered that AIM was not a Wisconsin-licensed health insurance provider, but was, rather, an insurance scam.

¶4 Zimmermann answered the complaint, denying liability. Zimmermann moved for summary judgment on several grounds, including Nahmens's failure to name an expert witness to establish the standard of care for a professional insurance agent or to calculate Nahmens's damages. Nahmens cited

Zimmermann's deposition testimony that his employer, the American Insurance Organization (AIO), recommended AIM as an insurance provider and that Zimmermann was assured by AIO that it had conducted thorough checks on all companies it recommended. Zimmermann argued that an expert was necessary to establish whether Zimmermann's conduct met the professional standard of care under the circumstances. Zimmermann also cited the coverage that should have been provided under the terms of the AIM insurance policy, and argued that an expert was necessary to reasonably calculate Nahmens's damages.

¶5 Nahmens opposed summary judgment, arguing that there were material facts in dispute as to whether Zimmermann exercised the degree of care, skill, and judgment required of a professional insurance agent under the circumstances. Nahmens cited evidence that: Nahmens told Zimmermann that she wanted the most coverage possible and thought that the AIM policy would cover her surgery; Zimmermann failed to inform Nahmens that AIM was not a Wisconsin-licensed insurance provider or that errors and omissions coverage was not available for the AIM policy; and Zimmermann failed to notify Nahmens when AIM changed its name. Nahmens argued that expert testimony was unnecessary because a factfinder could use ordinary knowledge and experience to determine that Zimmermann failed to exercise the required degree of care under the facts and could find that the breach of professional duty was obvious. She also argued that expert testimony was not required as to damages because Nahmens was seeking damages for her medical bills, the insurance premiums paid to AIM, and attorneys' fees and costs, all of which were set forth in the evidentiary submissions.

¶6 The circuit court determined that expert testimony was necessary to establish whether Zimmermann's actions met the standard of care usually

exercised by insurance agents under the circumstances and to calculate Nahmens's damages. The court concluded that Zimmermann was entitled to summary judgment because Nahmens had failed to name an expert witness. Accordingly, the court entered an order dismissing Nahmens's action against Zimmermann. Nahmens appeals.

¶7 Nahmens argues that expert testimony was not necessary to establish that Zimmermann's actions were negligent because whether Zimmermann exercised the usual degree of care, skill, and judgment under the circumstances is a question for the trier of fact. *See* WIS JI—CIVIL 1023.6. She argues that a trier of fact did not need expert testimony to find that Zimmermann was negligent by: (1) failing to procure an insurance policy for Nahmens with the level of coverage that Nahmens said she wanted and thought she had obtained; (2) failing to inform Nahmens that errors and omissions coverage was not available for the AIM policy; and (3) failing to verify that AIM was a Wisconsin-licensed insurance provider. She contends that the question for a trier of fact would be whether Zimmermann took standard actions to insure that the policy he procured for Nahmens fit her requirements, which, Nahmens contends, does not require any specialized knowledge. She also contends that expert testimony is not required as to damages, arguing that her damages are the amount of coverage she indicated she wanted to obtain, that is, an amount to cover most of her medical bills. We disagree, and conclude that the well-reasoned decision of the circuit court is correct.

¶8 We review summary judgments *de novo*, using the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). A motion for summary judgment is

properly granted where the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2) (2013-14).¹ “Whether expert testimony is necessary in a given situation is a question of law.” *Grace v. Grace*, 195 Wis. 2d 153, 159, 536 N.W.2d 109 (Ct. App. 1995).

¶9 “Expert testimony is required when the issue under consideration involves ‘special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of [hu]mankind.’” *Id.* (quoted source omitted) (alteration in original). Thus, expert testimony is generally required in malpractice cases, “to establish the parameters of acceptable professional conduct.” See *Helmbrecht v. St. Paul Ins. Co.*, 122 Wis. 2d 94, 112, 362 N.W.2d 118 (1985). However, “[e]xpert testimony is not required in cases where the breach is so obvious that it may be determined by the court as a matter of law or where the standard of care is within the ordinary knowledge and experience of the jurors.” *Id.*

¶10 Here, expert testimony was required to establish whether Zimmermann’s conduct fell within the parameters of the usual care exercised by insurance agents under the circumstances. See *id.*; WIS JI—CIVIL 1023.6. Whether a reasonable insurance agent would have differently advised Nahmens or obtained a policy with better or more reliable coverage, informed Nahmens that the AIM policy did not have errors and omissions coverage, and independently researched AIM’s license rather than rely on AIO’s recommendation, is not within the realm of ordinary experience. Nahmens does not explain how a jury would

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

know what would be negligent conduct for an insurance agent under these circumstances. We conclude that Zimmermann's alleged actions and failures to act in connection with his procuring the AIM policy for Nahmens were not obviously negligent, nor is the standard of care in this context within a jury's ordinary knowledge and experience. Thus, expert testimony was required.

¶11 Similarly, Nahmens does not explain how damages would be calculated absent an expert witness. Nahmens asserts that she is entitled to damages for the coverage she wanted and thus her damages are an amount that would cover "most" of her medical bills. However, absent expert testimony to explain the coverage that Nahmens would have had absent Zimmermann's alleged negligence, it is impossible to determine the amount of Nahmens's damages. *See Appleton Chinese Food Service, Inc. v. Murken Ins., Inc.*, 185 Wis. 2d 791, 519 N.W.2d 674 (Ct. App. 1994) (damages from an insurance agent's failure to procure insurance are generally determined by the terms of the policy that the agent failed to procure).

¶12 When a party fails to provide required expert testimony, the evidence is insufficient to support a claim. *See Cramer v. Theda Clark Mem'l Hosp.*, 45 Wis. 2d 147, 152, 172 N.W.2d 427 (1969). Accordingly, we conclude that summary judgment was properly granted to Zimmermann.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

